Western New England Law Review

Volume 5 5 *(1982-1983)*
Issue 4

Article 7

1-1-1983

CONSTITUTIONAL LAW—THE PRIVILEGES AND IMMUNITIES CLAUSE—Massachusetts Council of Construction Employers, Inc. v. Mayor of Boston, 1981 Mass. Adv. Sh. 2039, 425 N.E.2d 346

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CONSTITUTIONAL LAW—THE PRIVILEGES AND IMMUNITIES CLAUSE— *Massachusetts Council of Construction Employers, Inc. v. Mayor of Boston*, 1981 Mass. Adv. Sh. 2039, 425 N.E.2d 346.

I. INTRODUCTION

Public works construction is a $55 billion industry[1] that has a broad based impact on the national economy. In Massachusetts alone, $675 million worth of public construction projects were initiated in 1980.[2] The industry is regulated by a myriad of statutes ranging from who is qualified to bid for a particular project[3] to the terms of performance of an awarded contract.[4] One such statute,[5] which provided employment preferences for Massachusetts residents in public works construction projects, was recently invalidated by the Massachusetts Supreme Judicial Court in *Massachusetts Council of Construction Employers, Inc. v. Mayor of Boston (MCCE)*.[6]

The challenged statute created an *absolute* employment preference for residents whenever private contractors engaged in public works projects of the commonwealth.[7] The purpose of the statute, as found by the court, was to ease unemployment in the state and to ensure that public funds were spent in maximizing benefits to the

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1. Brief for Plaintiffs-Appellants at 30, Massachusetts Council of Constr. Employers, Inc. v. Mayor of Boston, 1981 Mass. Adv. Sh. 2039, 425 N.E.2d 346 (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CONSTRUCTION REP.: VALUE OF NEW CONSTRUCTION PUT IN PLACE, c. 30-80-12, (1980)).

2. Reply Brief for Plaintiffs-Appellants at 9 n.6, Massachusetts Council of Constr. Employers, Inc. v. Mayor of Boston, 1981 Mass. Adv. Sh. 2039, 425 N.E.2d 346.

3. MASS GEN. LAWS ANN. ch. 149, §§ 44A-44H (West 1982).

4. MASS GEN. LAWS ANN. ch. 30, §§ 39F-39L (West 1979 & Supp. 1982).

5. MASS. GEN. LAWS ANN. ch. 149, § 26 (West 1982). The statute reads in pertinent part:

> In the employment of mechanics and apprentices, teamsters, chauffeurs and laborers in the construction of public works by the commonwealth, . . . or by persons contracting or subcontracting for such works, *preference shall first be given to citizens of the commonwealth* who have been *residents of the commonwealth* for at least six months at the commencement of their employment . . . and who are qualified to perform the work to which the employment relates; . . . and if they cannot be obtained in sufficient numbers, then to citizens of the United States, and every contract for such work shall contain a provision to this effect.

Id. (emphasis added).

6. 1981 Mass. Adv. Sh. 2039, 425 N.E.2d 346.

7. *Id.* at 2044, 425 N.E.2d at 350.

locality where the monies were raised.[8]

The major participants in the construction industry representing both labor and management,[9] filed a complaint seeking a declaratory judgment that the residency requirements of the statute and a hiring quota system established by an Executive Order of the city of Boston were unconstitutional.[10] The court in the *MCCE* decision declared

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8. *Id.* at 2045, 425 N.E.2d at 350. The court deduced these general purposes from those purposes argued by the defendants: The promotion of employment of residents and the concomitant alleviation of unemployment; the reduction of economic and social costs to the commonwealth arising from unemployment; and the generation of secondary economic activities and tax revenues resulting from retention of public funds within the commonwealth. Brief for Defendant Dep't of Labor & Ind. at 5, 1981 Mass. Adv. Sh. 2039, 425 N.E.2d 346.

9. The individual plaintiffs were the Massachusetts State Building and Construction Trades Council AFL-CIO, the Building and Construction Trades Council of the Metropolitan District AFL-CIO, individual contractors incorporated in Massachusetts, individual contractors incorporated in Rhode Island, and members of sixteen trade unions. 1981 Mass. Adv. Sh. at 2039 n.1, 425 N.E.2d at 346 n.1. The defendants were the City of Boston, the Boston Redevelopment Authority, the Economic Development and Industrial Corporation, and the Massachusetts Department of Labor and Industries. The Boston Jobs Coalition, Inc. intervened as a defendant. *Id.* at 2039 n.2, 425 N.E.2d at 346 n.2.

10. *Id.* at 2040-43, 425 N.E.2d at 347-49. The Executive Order of the city of Boston established a hiring preference quota system. In any construction project to which the city was a signatory to the construction contract, worker hours on a craft-by-craft basis had to be performed by: at least fifty percent bona fide Boston residents; at least twenty five percent minorities; and at least ten percent women. *Id.* at 2040 n.4, 245 N.E.2d at 347 n.4.

A single justice, who heard the original action, reserved and reported ten questions to the full courts:

> 1. Is the application of G. L. c. 149, § 26, to construction projects involving Federal assistance invalid because it is in conflict with the Federal statutes (and rules and regulations derived therefrom) authorizing such assistance and/or is such application of the statute invalid under the Supremacy Clause of the United States Constitution?
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> 2. Does G. L. c. 149, § 26, conflict with the privileges and immunities clause, the due process clause, the equal protection clause, the contract clause and the commerce clause of the United States Constitution, and does it conflict with Articles I, X, and XII of the Massachusetts Constitution?
>
> 3. Does G. L. c. 149, § 26, conflict with the obligations of the plaintiffs under the National Labor Relations Act, and is it therefore invalid under the Supremacy Clause of the United States Constitution?
>
> 4. Is the application of the residency aspects of Executive Order to construction projects involving Federal assistance invalid because in conflict with the federal statutes (and rules and regulations derived therefrom) authorizing such assistance and/or is such application of the Executive Order invalid under the Supremacy Clause of the United States Constitution?
>
> 5. Does the Executive Order, by establishing a residents' preference, conflict with the privileges and immunities clause, the due process clause, the equal protection clause, the contract clause and the commerce clause of the United

that the residency preference requirement of the statute[11] violated the Privileges and Immunities Clause of the United States Constitution.[12]

This note will examine the history of the privileges and immunities clause and the various judicial tests proposed to construe it. Additionally, the note will examine the *MCCE* case and criticize that decision's misplaced reliance on other authority.[13]

Privileges and immunities litigation has been confused and entangled with decisions that have cast ambiguity on the principles of

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States Constitution, and does it conflict with Article I, Article [X] and Article XII of the Massachusetts Constitution?

6. Do the residency aspects of Executive Order conflict with the obligation of the plaintiffs under the National Labor Relations Act, and is it therefore invalid under the Supremacy Clause of the United States Constitution?

7. Are the residency aspects of Executive Order invalid under Section 6 or Section 7(5) of Article 89 of the amendments to the Constitution of Massachusetts, and/or G. L. c. 43B, § 13 (the Home Rule Procedures Act)?

8. Does the BRA violate the provisions of G. L. c. 121A by conditioning approval of application for tax status under that Chapter upon an applicant's acceptance of Section 8 of the BRA's 'Rules and Regulations Governing Chapter 121A Projects in the City of Boston'?

9. Are the residency aspects of the Executive Order invalid as beyond the inherent power of the Mayor under the City Charter?

10. Is the conditioning of a developer's application for a UDAG [Urban Development Action Grant] upon his agreement to abide by the residency aspects of the Executive Order in conflict with 42 U.S.C. sec. 5301 *et seq*. and/or is such conditioning invalid under the Supremacy Clause of the U.S. Constitution?

Id. at 2042 n.9, 425 N.E.2d at 348-49 n.9.

This note will not examine the rulings on the Executive Order of the city of Boston held to violate the commerce clause of the United States Constitution, *Id*. at 2052-54, 425 N.E.2d at 354-55, or the ruling that neither the statute nor the Executive Order conflicted with the National Labor Relations Act and therefore did not violate the federal preemption doctrine under the Supremacy Clause of the United States Constitution. *Id*. at 2043, 425 N.E.2d at 349. The Executive Order was recently declared unconstitutional by the Supreme Court in White v. Massachusetts Council of Constr. Employers Inc., 103 S. Ct. 1042 (1983). The subject of this note was not at issue upon the appeal.

11. Only the residency preference of the statute was before the court. The six month durational requirement of the statute was not at issue. This aspect of the statute required that in order for a person to be given the hiring preference under the statute, the person must have been a resident of the state for at least the six months prior to his commencing employment. *Id*. at 2041 n.6, 425 N.E.2d at 348 n.6. *See supra* note 5. *Compare* Shapiro v. Thompson, 394 U.S. 618 (1969).

12. 1981 Mass. Adv. Sh. at 2039, 425 N.E.2d at 346. The Privileges and Immunities clause of the United States Constitution reads as follows: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.

13. *E.g.*, Hicklin v. Orbeck, 437 U.S. 518 (1978). *See infra* notes 95-105 and accompanying text.

the clause.[14] With the recent increase in privileges and immunities clause litigation,[15] the court had an opportunity to develop a consistent basis for privileges and immunities analysis. It will be demonstrated that instead of examining and weighing the facts, the court has misplaced its reliance on other authority by disregarding the valid distinctions between the cases[16] and applied the proper standard of analysis only in a cursory fashion.

II. HISTORICAL BACKGROUND

The language of the privileges and immunities clause was adopted from Article IV of the Articles of Confederation.[17] That article declared its purpose as promoting "mutual friendship and intercourse among the people of the different states in the Union."[18] The clause was adopted by the Constitutional Convention without great debate and placed in Article IV, along with other sections that concerned interstate relationships.[19]

The Supreme Court has attempted to establish a standard to effectuate the purpose of the privileges and immunities clause. The result has been a line of cases that have created varying tests which have caused difficulty and confusion for the courts in their analysis.[20]

The first major case to consider the application of the privileges and immunities clause was *Corfield v. Coryell*,[21] in which Circuit

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14. *See, e.g.*, Note, *Looking for Privileges and Immunities*, 41 U. PITT. L. REV. 89 (1975).

15. A search of all reported cases in the Supreme Court, the courts of appeals, the circuit courts and the highest court of each state for the years 1950 through 1982 revealed that privileges and immunities litigation is increasing. For the 10 year period from 1950 to 1959, 11 cases discussed the privileges and immunities clause. This number rose to 25 for the 1960 to 1969 period, and to 88 for the 1970 to 1979 period. For the period from 1980 to June 1982, the number of cases was 46, which, if extrapolated to 1989, would predict 184 cases on this subject. This progression shows that the number of cases that consider the privileges and immunities clause more than doubles in every ten years.

16. *See infra* notes 95-105 and accompanying text.

17. Knox, *Prospective Applications of the Article IV Privileges and Immunities Clause of the United States Constitution*, 43 MO. L. REV. 1, 5 (1978).

18. ARTICLES OF CONFEDERATION art. IV. "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States. . . ." *Id.*

19. 3 M. Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, 112, 173 (1911).

20. *See*, Note, *supra* note 14, at 94.

21. 6 F. C. 546 (E.D. Pa. 1823) (Justice Bushrod Washington on circuit).

Court Justice Bushrod Washington upheld a New Jersey statute that made it unlawful for nonresidents to gather shellfish in New Jersey waters.[22] In determining whether the clause encompassed shellfishing, Justice Washington examined the rights at issue.[23] Under his standard, the privileges and immunities clause would apply to those rights

> which are, in their nature, *fundamental*; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign . . . . [Including the] right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise.[24]

Therefore, the Court's early judicial interpretation of the clause established that only fundamental rights were protected by the clause, and that the court could determine which rights were (and, conversely, which were not) fundamental.[25]

In *Paul v. Virginia*,[26] the Court changed the focus of its analysis of the privileges and immunities clause from protecting the fundamental rights of citizens of a free government to that of protecting nonresidents from discrimination by states and insuring them the *same rights* as residents of those states.[27] Against a privileges and immunities clause challenge, the Court upheld a Virginia statute that required out-of-state insurance companies to place a deposit of thirty to fifty thousand dollars with the state treasury in order to do business in the state.[28] The Court reasoned that a corporation was not a person under the privileges and immunities clause and that the clause did not secure, in a foreign state, the special privileges granted to a citizen by his own state.[29] Rather, the clause secured to a nonresident the identical privileges and immunities that the state

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22. *Id.* at 555.
23. *Id.* at 550-55.
24. *Id.* at 551-52 (emphasis added).
25. *See id.*
26. 75 U.S. (8 Wall.) 168 (1869).
27. *Id.* at 180.
28. *Id.* at 168.
29. *Id.* The creation of a corporation is the exercise of a state law. This special privilege cannot extend outside the boundaries of the sovereignty in which it was created. Therefore, another state is totally free to recognize or place conditions on its recognition of an out-of-state corporation. Any other construction of the privileges and immunities clause would destroy the independence and harmony of the states the clause was envisioned to create. *Id.* at 181.

granted to its own citizens under the laws and constitution of that state.[30]

III. THE MODERN INTERPRETATION

The case of *Toomer v. Witsell*[31] announced what has been characterized as the modern approach to privileges and immunities clause protection.[32] In *Toomer*, the Court struck down a South Carolina statute, as violative of the privileges and immunities clause, because it limited commercial access to migratory shrimp in the three-mile maritime belt off the state's coast.[33] The statute limited commercial access by imposing a license fee one hundred times greater for each nonresident shrimp boat.[34] The Court created a "substantial reason" test as the criterion for privileges and immunities protection.[35] The Court stated that the clause did not create an absolute right to equal treatment, but that it did bar discrimination against nonresidents unless there were *substantial reasons* for the discrimination, beyond the mere fact that the nonresidents were not citizens of a particular state.[36] The clause allowed disparity of treatment of nonresidents, but only when supported by "valid independent reasons"[37] and an indication that nonresidents were the *peculiar source of the evil* at which the statute was aimed.[38]

From this, it is evident that the task of the judiciary is to determine whether such independent reasons exist and whether they war-

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30. *Id.* at 180.

31. 334 U.S. 385 (1948).

32. *See* Note, *supra* note 14, at 99; Note, *The Privileges and Immunities Clause of Article IV: Fundamental Rights Revived*, 55 WASH. L. REV. 461 (1980).

In *Paul*, the Court had established an absolute state discrimination standard. If one state gave its citizen a certain right then that right must also be extended to nonresidents. 75 U.S. (8 Wall.) at 180. *Toomer* is a more flexible standard and allows state discrimination of nonresidents when a valid justification can be shown. *See infra* note 37 and accompanying text.

33. 334 U.S. at 399. The Court found that the practical effect of the statute was exclusionary and that the record did not show any supporting evidence that nonresidents were a *peculiar source of evil*. The record did not show, for example, that nonresidents use larger boats or that they were in fact the cause of higher costs of enforcement. *Id.* at 398.

34. *Id.* at 395.

35. *Id.* at 396.

36. *Id.*

37. *Id.* The Court stated that the purpose of the privileges and immunities clause was to help "fuse into one Nation" the several states and to ensure to a nonresident the same privileges which the citizens of the state enjoy. *Id.* at 395. For some recent examples of valid discrimination under the privileges and immunities clause, see *infra* notes 96-101 and accompanying text.

38. 334 U.S. at 398.

rant the degree of discrimination created by the state action.[39] In making this determination, the Court must be sensitive to the state's role of proscribing means to alleviate local problems.[40]

Toomer drastically shifted privileges and immunities analysis from an absolute dichotomous approach of whether a fundamental right existed to a more flexible standard of state justification of discriminatory actions.[41] The fundamental rights approach of *Corfield* has been displaced by the anti-discrimination approach of the post-*Toomer* decisions.[42]

The two most recent Supreme Court decisions involving the privileges and immunities clause, however, reveal that the present Court is uncertain of the *Toomer* approach and is cautiously considering reversion to the fundamental rights analysis.

In *Baldwin v. Fish and Game Commission*,[43] the court upheld a Montana hunting license statute that charged nonresidents as much as twenty-five times more than a resident for the equivalent license.[44]

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39. *Id.* at 396.

40. *Id.*

41. Professor Tribe suggests that this change in focus is so thorough that the fundamental rights approach is no longer important. The fundamental rights doctrine was first used as a limitation on the rigid approach of judicial intervention of state rights. Today, with a more flexible standard of allowing the states to discriminate in only properly justified situations, there is no longer the need to narrow the scope of the privileges and immunities clause. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 411 n.16 (1978).

42. *See, e.g.*, Hicklin v. Orbeck, 437 U.S. 518 (1978); Austin v. New Hampshire, 420 U.S. 656 (1975); Doe v. Bolton, 410 U.S. 179 (1973); Mullaney v. Anderson, 342 U.S. 415 (1952); Rubin v. Glaser, 83 N.J. 299, 416 A.2d 382 (1980); Lung v. O'Chesky, 94 N.M. 802, 617 P.2d 1317 (1980); Salla v. County of Monroe, 48 N.Y.2d 514, 399 N.E.2d 909, 423 N.Y.S.2d 878 (1979), *cert. denied*, 446 U.S. 909 (1980); Construction and Gen. Laborers Union Local 563 v. City of St. Paul, 270 Minn. 427, 134 N.W.2d 26 (1965); State v. Nolfi, 141 N.J. Super. 528, 358 A.2d 847 (1976).

In Mullaney v. Anderson, 342 U.S. 415 (1952), the Supreme Court struck down a statute charging nonresidents ten times more than residents for a fishing license. Because the state did not show a reasonable relation between the higher license fees or any additional costs to the territory, the Court held that the statute violated the privileges and immunities clause. *Id.* at 417-18.

43. 436 U.S. 371 (1978).

44. *Id.* at 388. The license scheme charged residents $9.00 for a license to hunt elk only and $30.00 for a combination license to hunt elk, deer, black bear and game birds. Nonresidents could not purchase a license to hunt elk only and were required to purchase the combination license at a price of $225.00. *Id.* at 373-74.

The *Baldwin* Court first cited Paul v. Virginia, as setting out the purpose of the privileges and immunities clause to eliminate state discrimination of nonresidents by ensuring nonresidents the same privileges and immunities that residents enjoy. *Id.* at 380; *see supra* notes 26-30 and accompanying text. The Court then quoted Hague v. CIO, 307 U.S. 496 (1939), for the proposition that it was the well settled view in privileges and immunities analysis that a person did not carry with him fundamental rights merely because of his citizenship; but that a nonresident visiting any state had the same privileges

In reconciling the different approaches used by other courts,[45] the Court set up two categories that distinguished the cases: those situations that were permitted because they reflected the fact that the nation is composed of individual states;[46] and those "other" situations[47] that are prohibited because they hinder the formation, purpose and development of the nation.[48] The Court concluded that the privileges and immunities clause only protects those rights that are vital to the maintenance of the nation as a single entity.[49] Therefore, the first step in the analysis must be a determination into which category the challenged statute falls;[50] that is, whether it concerns a fundamental right. After such a determination, the Court would then consider whether the challenged statute could be justified by the state under the *Toomer* substantial reason test.[51]

Using this two step analysis, the Court found that elk hunting was not a fundamental right under the first part of the test and upheld the statute as not violative of the privileges and immunities clause.[52] The decision was based upon an ownership theory[53] which presupposes that a state has a right to control and regulate resources that it owns, provided that the state does not interfere with interstate commerce, the proper exercise of federal power, or the right to pursue a livelihood in another state as protected by the clause.[54]

Justice Brennan, in his dissent, strongly criticized the renewal of the fundamental rights limitation.[55] He believed that it was time to clearly state what had been implicit in modern privileges and immunities analysis: that a fundamental rights approach should have no

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and immunities as the residents of that state. 436 U.S. at 381 (quoting Hague v. CIO, 307 U.S. 496, 511 (1939)). The Court then recognized valid situations where residency might be used to distinguish between persons, as, for example, in the areas of voting rights, qualifications of an elected state official and the application of state laws and services. 436 U.S. at 383.

45. *See supra* notes 21-42 and accompanying text.

46. *See supra* note 44.

47. The Court did not give specific examples of this category and did not decide the range of activities that would fit into this category. 436 U.S. at 388.

48. *Id.* at 383.

49. *Id.*

50. *Id.* at 383-84.

51. *Id.* at 386-87.

52. *Id.* at 388.

53. *See infra* notes 127-128 and accompanying text.

54. 436 U.S. at 385-86 (citations omitted). The reasons stated by the Court were: Elk hunting is a sport, not a means of livelihood; nonresidents were not totally excluded from hunting elk; and the elk supply is finite and must be carefully tended in order to preserve it. *Id.* at 388.

55. *Id.* at 402 (Brennan, J., dissenting).

weight in considering whether a state's discrimination has violated the clause.[56] Rather, he believed the Court's primary concern should be the state's justification for its discrimination.[57]

One month later, Justice Brennan, writing for a unanimous Court in *Hicklin v. Orbeck*,[58] invalidated an Alaska law which required that qualified state residents be hired preferentially over equally qualified nonresidents for *any* employment resulting from an oil and gas lease, easement or right of way when the State of Alaska was a party to those leases or permits.[59] Justice Brennan, relying on the reasoning of his dissent in *Baldwin*, required a state justification of the discrimination without considering a fundamental rights analysis.[60] Justice Brennan found the statute did not meet the substantial reason test: first, it swept more broadly than necessary to achieve the goal of relieving unemployment since that could have been accomplished by a statute specifically aimed at the unemployed;[61] second, there was no evidence that the nonresidents were the peculiar source of Alaska's unemployment;[62] and third, Justice Brennan rejected the theory that Alaska's ownership of oil and gas gave the authority to place conditions on the sale or lease of that resource.[63] The statute was "an attempt to force virtually all businesses that benefit[ed] in some way from the economic ripple effect" of Alaska's oil and gas resources, to prefer employment of state residents.[64] The Court believed Alaska's ownership of these resources did not constitute sufficient justification for the pervasive discrimination against nonresidents that the statute required.[65]

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56. *Id.*

57. *Id.* Justice Brennan then looked at the case under the *Toomer* approach of the substantial reason test and determined that there was no justification for the discrimination as a method to conserve elk, a means to reduce the costs of additional enforcement due to nonresidents, or based upon the right of a state to control the resources that it owns. *Id.* at 402-06.

58. 437 U.S. 518 (1978).

59. *Id.* at 520.

60. *Id.* at 525-26.

61. *Id.* at 528. The statute preferred employed, as well as unemployed, residents over nonresidents. The Court believed the statute was overly broad and was not directed at the problem it sought to remedy. *Id.* at 527-28.

62. *Id.* at 526. The Court distilled the substantial reasons required by *Toomer* to be the lack of less restrictive alternatives. Further, the Court determined that Alaska's unemployment was due to the lack of education and job training of residents and because of the geographical remoteness of residents from job opportunities. *Id.* at 526-27.

63. *Id.* at 528-31.

64. *Id.* at 531.

65. *Id.* at 531. State ownership is an important factor to be considered in a privileges and immunities analysis. *Id.* at 528-29. *See* Salla v. County of Monroe, 48 N.Y.2d

Although the Court does not always agree on the proper framework for analyzing the privileges and immunities clause, courts and commentators agree that the clause facilitates national unification by giving citizens who venture outside their own state some federal protection.[66] The issue is the extent of that protection and *Hicklin* defined the substantial reason test as the appropriate means to determine that extent.[67] The test was to examine whether first, the presence or activity of nonresidents was the *peculiar source of the evil* the state was attempting to remedy; and second, if the discrimination practiced against nonresidents bore a substantial relation to the problem they represented.[68] This balancing approach, then, weighs the interests of the state against the discriminatory actions toward nonresidents. *Hicklin* did not hold that a residency preference statute was invalid *per se*,[69] but rather held that the challenged statute

514, 524, 399 N.E.2d 909, 914, 423 N.Y.S.2d 878, 883 (1979), *cert. denied*, 446 U.S. 909 (1980). In McCready v. Virginia, 94 U.S. 391 (1876), the Supreme Court created an absolute exception which allowed a state to do as it saw fit with the resources that it owned. In *McCready*, a nonresident plaintiff challenged a Virginia statute which prohibited nonresidents from planting shellfish in Virginia waters. The Court ruled that Virginia owned the tidewaters and their beds and therefore, had the power to use those areas as they saw fit. *Id.* at 396. The *McCready* doctrine, which was based solely on an ownership theory, exempted a state from scrutiny under the privileges and immunities clause. *See* Baldwin, 436 U.S. at 384-86; Ebbeson v. Board of Public Educ. in Wilmington, 18 Del. Ch. 37, 43-45, 156 A. 286, 289 (1931) (The *McCready* exception applies to public revenues in construction of public works.) Over time, the *McCready* doctrine has been reduced from an absolute exception to a crucial factor in determining whether the state's discrimination against nonresidents violates the privileges and immunities clause. *See supra* note 127 and accompanying text.

66. Courts have held the following to be privileges protected by the privileges and immunities clause: the right to have equal treatment with respect to taxes, Austin v. New Hampshire, 420 U.S. 656 (1975); to have access to hospitals, Doe v. Bolton, 410 U.S. 179 (1973); to enjoy freedom of travel among the states, Maxwell v. Bugbee, 250 U.S. 525 (1919); to engage in business, Toomer v. Witsell, 334 U.S. 385 (1948); and to own, sell and deal with personal property in another state, Blake v. McClung, 172 U.S. 239 (1898). *See also* Knox, *supra* note 17.

67. 437 U.S. at 525-26. Another view reconciles *Baldwin* and *Hicklin* as requiring a two-step analysis. The first step is to determine whether a fundamental right has been infringed. If so, the first step is met, and the court will reach the second step and apply the substantial reason test. *See* Ely, *The Supreme Court, 1977 Term - Forward: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 78-86; Recent Cases, *Commerce Clause—Privileges and Immunities Clause—State Hiring Discrimination Against Nonresidents*, 12 AKRON L. REV. 346; Note, *The Privileges and Immunities Clause: A Reaffirmation of Fundamental Rights*, 33 U. MIAMI L. REV. 691 (1979) [hereinafter *Fundamental Rights*]. *But see* Hicklin, 437 U.S. 518; State v. Nolfi, 141 N.J. Super. 528, 358 A.2d 853 (1976); Note, *supra* note 14, at 107-110; Note, *Domicile Preferences in Employment: The Case of Alaska Hire*, 1978 DUKE L.J. 1069 [hereinafter *Alaska Hire*]; Note, *supra* note 32.

68. *See* Ely, *supra* note 67, at 75-76.

69. 437 U.S. at 528.

must pass the scrutiny of the substantial reason test.[70]

The *Hicklin* balancing approach of privileges and immunities analysis closely resembles the analysis of the commerce clause[71] and the equal protection clause.[72] Because these clauses are also federal limitations on state and local power, the similarity in analysis lends additional support for the validity of the *Hicklin* approach.

IV. ANALYSIS

In *MCCE*, the residency preference was challenged on a variety of grounds, both statutory and constitutional.[73] Because none of the statutory challenges invalidated the preference statute,[74] the court

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70. *Id.* at 527.

71. The commerce clause and the privileges and immunities clause have a "mutually reinforcing relationship [due to] their common origin in the Fourth Article of the Articles of Confederation." *Id.* at 531-32 (footnote omitted). *See infra* note 132 and accompanying text. *Hicklin* acknowledged this relationship by invalidating the statute on the basis of the privileges and immunities clause and used the commerce clause as a gauge for improper discrimination. *Id.* Whether or not resources are destined for interstate commerce becomes a factor in determining what permissible discriminations will be allowed. *Id.* at 531-33. For similar commerce clause cases that invalidate state laws discriminating against nonresidents in receiving goods of interstate commerce, *see* Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928); Pennsylvania v. West Virginia, 262 U.S. 553 (1923); West v. Kansas Natural Gas Co., 221 U.S. 229 (1911). *But see* Reeves, Inc. v. Stake, 447 U.S. 429 (1980); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978); Baldwin, 436 U.S. 371 (1978); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976); American Yearbook Co. v. Askew, 339 F. Supp. 719 (M.D. Fla.), *aff'd mem.*, 409 U.S. 904 (1972).

72. The closeness between the valid state interest and the resulting discrimination of nonresidents required by the substantial reason test in *Hicklin*, resembles the intermediate level of scrutiny applied in equal protection cases. *See, e.g.*, Ely, *supra* note 67, at 86; Tribe, *supra* note 33, at 411 n.17. The standards used in *Toomer* and Austin v. New Hampshire, 420 U.S. 696 (1975), have also been compared to the intermediate level of scrutiny of equal protection. For a discussion of their relationship *see Alaska Hire*, *supra* note 67, at 1081; *Fundamental Rights*, *supra* note 67, at 698-99.

For cases that consider nonresident discrimination under an equal protection basis, see Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973); Shapiro v. Thompson, 394 U.S. 618 (1969); Edwards v. California, 314 U.S. 160 (1941).

73. *See supra* note 10 and accompanying text.

74. One such challenge that failed was the preemption doctrine, which prevents a state from frustrating a federal policy as promulgated under any federal statute. The *MCCE* court held that the preference statute was not preempted under the National Labor Relations Act (NLRA) because the statute did not interfere with the negotiation process between the unions and the employers. 1981 Mass. Adv. Sh. at 2046, 425 N.E.2d at 351. The Massachusetts statute was neutral and did not alter the bargaining position of either party. *Id.* *See* Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976); Note, *State Regulation of Employment of Illegal Aliens is not per se Preempted by Federal Control over Immigration or by the Immigration and Nationality Act*, 12 TEX. INT'L L.J. 87 (1977).

reached the constitutional issues, including the privileges and immunities clause.

The *MCCE* court cited *Toomer*, to establish the basic purpose of the clause as being to secure to nonresidents the same privileges that residents of the state enjoy.[75] The court recognized that states were not prevented from favoring their own citizens in certain circumstances[76] but that definite limitations existed on the preferential methods that could pass constitutional muster.[77]

The court followed the two step analytical framework of *Baldwin*,[78] which first determined if the right under consideration was fundamental and, second, if the discrimination could be justified, either by a showing that nonresidents were a *peculiar source of the evil* that the statute was aimed to remedy, or if there was a valid independent reason for the discrimination other than the mere fact of nonresidency.[79]

The *MCCE* court cited *Rubin v. Glaser*[80] and *Lung v. O'Chesky*[81] as examples of valid state discrimination against nonresidents tested under the substantial reason doctrine.[82] In *Rubin*, a New Jersey Homestead Rebate Act that applied only to the principal residence of New Jersey residents was upheld.[83] The Act was enacted to alleviate the heavy burden of realty taxes on the principal place of residence of New Jersey residents.[84] The court justified the decision on the basis that the Act was closely related to its purpose[85] and the Act did not discriminate solely against nonresidents.[86] In *Lung*, the court upheld a grocery and medical tax rebate to New

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75. 1981 Mass. Adv. Sh. at 2046, 425 N.E.2d at 351. (citing Toomer, 334 U.S. at 395).

76. *See* Reeves, Inc. v. Stake, 447 U.S. 429 (1980) (favoring state citizens in selling concrete from a state-owned plant during shortages); Baldwin, 436 U.S. 371 (1978) (charging nonresidents substantially higher license fees for recreational hunting).

77. 1981 Mass. Adv. Sh. at 2047, 425 N.E.2d at 351. The court cited Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978), a commerce clause case, which sets the limits of preferential treatment as whenever the state attempts to isolate itself from the national economy.

78. *See supra* notes 45-54 and accompanying text.

79. 1981 Mass. Adv. Sh. at 2047, 425 N.E.2d at 351.

80. 83 N.J. 299, 416 A.2d 382 (1980).

81. 94 N.M. 802, 617 P.2d 1317 (1980).

82. 1981 Mass. Adv. Sh. at 2047, 425 N.E.2d at 351.

83. 83 N.J. at 304, 416 A.2d at 384.

84. *Id.*

85. *Id.* at 307, 416 A.2d at 386-87.

86. *Id.* Residents of New Jersey who rented or had a summer home did not qualify for the rebate and were discriminated against along with the nonresidents. *Id.*

Mexico residents.[87] The legitimate state purpose of granting relief from gross receipts and property taxes to individuals who actually paid those taxes, was the substantial reason for the distinction between residents and nonresidents.[88]

In assessing whether the statute discriminated against a fundamental right, the *MCCE* court cited *Corfield* as having established that the privileges and immunities clause protected the right of a citizen to go into another state for purposes of trade, agriculture and professional pursuits.[89] After reviewing subsequent fundamental right decisions,[90] the court concluded that limiting a particular kind of work opportunity on the basis of residency impinged upon the fundamental right of pursuing a livelihood.[91]

The second prong of the test in the *MCCE* decision is the substantial reason test of *Toomer*.[92] The *MCCE* court concluded that *Hicklin* was controlling on these facts, and had established a clear rule forbidding a state to use its control of a resource to create an absolute hiring preference of residents.[93]

The court rejected the two principle arguments used by the state to distinguish *Hicklin*. First, the state claimed that the statute regulated employment, a limited resource, as opposed to an unlimited resource like oil or gas. Secondly, the state argued, it was acting as a market participant[94] in the construction of projects and therefore should be able to act, as in commerce clause cases, without the restrictions of the privileges and immunities clause.[95]

In considering the limited resource distinction, the court acknowledged that a state preference of residents could be allowed when a resource was limited but noted that there must be a showing that the resources were overburdened.[96] *Hicklin* also required a

87. 94 N.M. at 805, 617 P.2d at 1320.

88. *Id.* Since nonresidents did not pay those taxes, a rebate to them would not further the relief contemplated by the legislature. *Id.*

89. Corfield v. Coryell, 6 F. Cas. at 552.

90. The court also recognized that the right involved in *MCCE* was the pursuit of a livelihood and cited *Toomer* and *Baldwin* in support. 1981 Mass. Adv. Sh. at 2048, 425 N.E.2d at 352.

91. 1981 Mass. Adv. Sh. at 2049, 425 N.E.2d at 352. *See also* Toomer v. Witsell, 334 U.S. 385 (1948); Edwards v. California, 314 U.S. 160 (1941); Chalker v. Birmingham & N.W. Ry., 249 U.S. 522 (1919); Salla v. County of Monroe, 48 N.Y.2d 514, 399 N.E.2d 909, 423 N.Y.S.2d 878 (1979).

92. *See supra* notes 35-38 and accompanying text.

93. 1981 Mass. Adv. Sh. at 2049-50, 425 N.E.2d at 352-53.

94. *See infra* notes 81-85 and accompanying text.

95. 1981 Mass. Adv. Sh. at 2050, 425 N.E.2d at 353.

96. *Id.* This view is supported by dicta in Doe v. Bolton, 410 U.S. 179 (1973)

showing that the nonresidents be the *peculiar source of the evil*, when unemployment was considered,[97] and the *MCCE* court determined that this was not shown.[98]

The second argument by the state, the market participant doctrine, has been a recognized exception to the commerce clause in situations in which a state is acting in a proprietary manner in providing or purchasing goods and services.[99] The rationale of the doctrine is that when a state is pursuing its own proprietary business interests instead of regulating private industry, it should be free to choose with whom it will do business, just as any other individual may.[100]

The *MCCE* court followed precedent and agreed that the com-

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which intimated that if state facilities were utilized to capacity, a statute giving preferential access to Georgia residents of these state owned facilities might be allowed. *Id.* at 200.

97. *See supra* note 62 and accompanying text.

98. 1981 Mass. Adv. Sh. at 2050, 425 N.E.2d at 353.

99. American Yearbook Co. v. Askew, 339 F. Supp. 719 (M.D. Fla.), *aff'd mem.*, 409 U.S. 904 (1972) (state proprietary functions are exempt from commerce clause scrutiny). *See also infra* notes 100-03.

100. The commerce clause does not concern itself with a state entering the marketplace as a purchaser or prescribing the conditions under which a state will do business. When a state is spending state money, courts seem to exempt the state from commerce clause restrictions. Aside from this generalization that states do not have to spend state money to promote the interests of nonresidents, no clear guidelines are available. *See* Wells & Hellerstein, *The Governmental-Proprietary Distinction In Constitutional Law*, 66 VA. L. REV. 1073. *See also* Reeves, Inc. v. Stake, 447 U.S. 429 (1980); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976); American Yearbook Co. v. Askew, 339 F. Supp. 719 (M.D. Fla.), *aff'd mem.*, 409 U.S. 904 (1972); People *ex rel.* Holland v. Bleigh Constr. Co., 61 Ill. 2d 258, 335 N.E.2d 469 (1975).

The market participant doctrine has been recently cited in *Reeves* as a valid consideration. 447 U.S. at 438. *See The Supreme Court, 1975 Term*, 90 HARV. L. REV. 1, 58-63 (1976). The *Reeves* Court also referred to Heim v. McCall, 239 U.S. 175 (1915) in support of the validity of the proprietary interest. 447 U.S. at 438-39.

Heim upheld a statute, similar to the *MCCE* statute, but on an equal protection basis. 239 U.S. at 193. The Court in *Hicklin* referred to *Heim* as being of dubious value in a privileges and immunities analysis. 437 U.S. at 531 n.15. The *MCCE* decision followed the *Hicklin* Court in not considering the value of *Heim*, which recognized the proprietary interest of a state to "have control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf. . . ." Heim, 239 U.S. at 191. The continuing vitality of this portion of *Heim* was recognized in C.D.R. Enterprises v. Board of Educ. of New York, 412 F. Supp. 1164, 1169-70 (1976).

Heim and its companion case, Crane v. New York, 239 U.S. 195 (1915) can be distinguished from *Hicklin*. Both *Heim* and *Crane* involved purely public works construction of subways and sewers and involved only state funds rather than employment in all businesses connected with Alaska's oil and gas. *Alaska Hire*, *supra* note 67, at 1091.

Hicklin avoided the issue of whether a more narrowly drawn statute would allow a state to properly prefer its residents on public works. Instead of examining *Heim* and *Crane*, the Court believed the cases were not pertinent because they were decided upon

merce clause would allow a state to prefer its own residents when it was purchasing goods[101] or services,[102] or distributing state-produced materials.[103] But the court distinguished the commerce clause cases by concluding that the market participant doctrine exception extended only to a state granting an initial sale or contract. Further, as the Supreme Court did not apply the doctrine to the absolute employment preference statute in *Hicklin*,[104] the *MCCE* court was unwilling to extend the doctrine in the present case.[105]

The court also cited *Salla v. County of Monroe*[106] in support of its decision because the court in *Salla* invalidated a New York statute nearly identical to the Massachusetts statute on a privileges and

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an equal protection basis. 437 U.S. at 531 n.15. *See* Ely, *supra* note 67, at 83 n.47; Knox, *supra* note 17, at 22-24.

If the state is the employer and state funds are being spent to develop the resource, *Hicklin* seems to indicate that the proprietary interests of the state may be controlling and the regulation upheld if narrowly drawn. 437 U.S. at 528.

This is to be distinguished from municipal hiring cases. When a government is an employer, it may impose restrictions on the activities of its employees as conditions of further employment. This has been upheld based upon the permanence of and reliance of the community on public service employment. Berg v. City of Minneapolis, 274 Minn. 277, 143 N.W.2d 200 (1966). *See also* Wardell v. Board of Educ. of Cincinnati, 529 F.2d 625 (6th Cir. 1976); Town of Milton v. Civil Service Comm'n, 365 Mass. 368, 312 N.E.2d 188 (1974); Detroit Police Officers Ass'n v. City of Detroit, 385 Mich. 519, 190 N.W.2d 97 (1971).

101. *See* Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976), where Maryland offered a bounty for every junk car titled in Maryland that was converted into scrap. The documentation required to be eligible for the bounty was more demanding on nonresidents than residents and the effect of the law restricted the flow of junk cars to nonresident scrap companies. *Id.* at 801-03. The Supreme Court upheld the statute against a commerce clause challenge because Maryland had not sought to prohibit the flow of goods but instead entered the market and bid up the price as a purchaser thereby restricting its trade to its own citizens. *Id.* at 808.

102. *See* American Yearbook Co. v. Askew, 339 F. Supp. 719 (M.D. Fla.), *aff'd mem.*, 409 U.S. 904 (1972) (Florida statute requiring the state to obtain printing services from in-state printers was upheld because state proprietary functions are exempt from commerce clause scrutiny).

103. *See* Reeves, Inc. v. Stake, 447 U.S. 429 (1980). In *Reeves*, a South Dakota statute that required favoring its citizens in the sale of cement produced from a state-owned plant during an actual shortage period was upheld. *Id.* at 436. The Court relied on the market participant doctrine to allow the state, in the absence of congressional action, to act without the restrictions of the commerce clause. *Id.* at 434-36. *See also* Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976).

104. 437 U.S. at 531.

105. 1981 Mass. Adv. Sh. at 2051, 425 N.E.2d at 353. Why the court did not consider the awarding of a public works construction project to be an initial granting of a contract but rather relied on *Hicklin* once again is not indicated in the opinion.

106. 48 N.Y.2d 514, 399 N.E.2d 909, 423 N.Y.S.2d 878 (1979), *cert. denied*, 446 U.S. 909 (1980).

immunities clause basis.[107]

In *Salla*, the New York Court of Appeals emphasized two major facts in its decision. First, the broad statutory language did not prefer unemployed over employed persons.[108] This was given considerable weight in *Hicklin*.[109] Second, the public works projects in *Salla* were largely funded by federal sources so that a valid market participant doctrine argument could not be made.[110]

In conclusion, the *MCCE* court relied heavily on *Hicklin* as controlling but did not distinguish the types of employment involved in the two cases. The court also did not believe that the market participant doctrine applied to the *MCCE* fact situation.

An initial examination of *Hinklin* shows similarities to *MCCE*. In both, the absolute preference was very broad because it favored employed as well as unemployed residents over nonresidents.[111] No showing was made, in either court, that the nonresidents were the *peculiar source* of the unemployment that the statute was aimed to remedy.[112] The alleviation of state unemployment, by excluding nonresidents, is inconsistent with the purpose of the privileges and immunities clause to promote comity and national economic unity among the states.[113] The *MCCE* decision correctly recognized these similarities[114] but failed to perceive the more subtle distinctions.

The major distinction between *Hicklin* and *MCCE* is the type of employment that the statutes regulated. In *Hicklin*, the statute regulated *all* private employment generated by any oil and gas activity in the state.[115] The challenged Massachusetts law in *MCCE* was more

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107. *Id.* at 518, 399 N.E.2d at 910, 423 N.Y.S.2d at 879.

108. *Id.* at 523, 399 N.E.2d at 914, 423 N.Y.S.2d at 882.

109. *Id.* at 524-25, 399 N.E.2d at 914, 423 N.Y.S.2d at 883.

110. *Id.* The doctrine is premised on the state spending state money in its proprietary actions. *See* Knox, *supra* note 17, at 21.

The *MCCE* court did not reject the market participant doctrine on a similar federal funding basis when it considered the statute, 1981 Mass. Adv. Sh. at 2051, 425 N.E.2d at 353-54, but clearly did so when it invalidated the Executive Order. *Id.* at 2053, 425 N.E.2d at 355. If federal funds were involved in projects under the statute, a more credible argument could be made that the market participant doctrine is inapplicable.

111. *See supra* notes 7 & 61 and accompanying text.

112. *See supra* notes 62 & 98 and accompanying text; Salla, 48 N.Y.2d at 523, 399 N.E.2d at 913-14, 423 N.Y.S.2d at 882; Construction and Gen. Laborers Union Local 563 v. City of St. Paul, 270 Minn. 427, 134 N.W.2d 26 (distinctions in classifying persons must be based on reasonable and substantial facts to justify the imposition of special legislation).

113. *See supra* notes 18-72 and accompanying text.

114. *See supra* note 93 and accompanying text.

115. 437 U.S. at 529-31. *See generally* Recent Cases, *supra* note 67, at 356; *Alaska Hire*, *supra* note 67, at 1091.

narrowly drawn and focused on a hybrid of public employment.[116] A public works project, whether done by the state or one of its instrumentalities, is a public, not private, character,[117] and the employment is a matter of major public concern. This distinction was determinative in *Holland v. Bleigh Construction Company*,[118] an Illinois case upholding a resident preference statute for the employment of laborers on public works projects. The *Holland* court believed the state had a valid interest in promoting the employment of its residents if the degree of discrimination against nonresident laborers on public works projects bore a close relation to this valid purpose.[119] While the *MCCE* defendants made the identical argument,[120] the court's opinion did not address it.[121]

Although the Massachusetts statute was more narrowly drawn than Alaska's, the statute still preferred employed and unemployed residents over unemployed nonresidents. There is no substantial reason for preferring employed residents over unemployed nonresidents.[122] This is particularly true, when the statute is seeking to alleviate unemployment, since preferring employed residents does not reduce unemployment.[123] The only reason for the discrimination, therefore, would be to keep nonresidents from obtaining employment within the state. This discrimination is based solely on residency and has been expressly prohibited by *Toomer*.[124] Therefore, the discrimination cannot be justified and the *MCCE* decision would remain unaltered.

Another distinction between *Hicklin* and *MCCE* is the nature of the state involvement. In *Hicklin*, private employers leased state land for oil and gas extraction, but there was no state funding or other involvement.[125] The Supreme Court stated that land owner-

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116. Brief for Defendant Dept. of Labor and Ind. at 23, Massachusetts Council of Constr. Employers, Inc. v. Mayor of Boston, 1981 Mass. Adv. Sh. 2039, 425 N.E.2d 346.

117. *See* Atkin v. Kansas, 191 U.S. 207, 207 (1903).

118. 61 Ill. 2d 258, 335 N.E.2d 469 (1975).

119. *Id.* at 273, 335 N.E.2d at 478-79.

120. Brief of Defendant Dept. of Labor and Ind. at 17, *supra* note 116. The statute was reasonably and substantially related to the valid state interest of securing "the appropriate allocation of public funds for the benefit of its residents without unduly impairing the constitutionally protected interests of nonresidents." *Id.*

121. This provides support for this note's premise that the *MCCE* opinion did not consider all the issues presented to the court.

122. *See supra* note 5.

123. Filling vacant jobs with a person already employed only creates another vacant position. Therefore, unemployment is not decreased but remains the same.

124. 334 U.S. at 396.

125. 437 U.S. at 530. The Alaskan statute applied to employers who have "no

ship alone could not justify the Alaska plan.[126] In *MCCE*, the Commonwealth of Massachusetts owned the land on which the public works projects were to be built. It also funded the projects, designed them and supervised their construction. The state was in full control and had a continuing intimate interest.

The Supreme Court has labeled state ownership as a crucial factor in the balancing approach of the privileges and immunities analysis.[127] Under the substantial reason test, a court must consider state ownership of property in determining whether the discrimination against nonresidents violates the privileges and immunities clause. In this respect, the ownership theory still has some vitality today but any power a state has over a resource must be exercised within the confines of the constitutional guarantees.[128]

It can be argued that state expenditure of funds to procure public works construction is a type of resource management and therefore would come under the *McCready* doctrine.[129] At the very least, it would make the ownership of state funds and property a crucial factor in determining the validity of the statute. The *McCready* doctrine by itself would not justify a reversal of the *MCCE* decision because the Massachusetts statute cannot pass the substantial reason test as long as employed residents are preferred over unemployed nonresidents. The *MCCE* decision, however, would have been more exemplary if the court had gone through the analysis. Instead, the court's opinion failed to include this doctrine entirely, despite its im-

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connection whatsoever with the State's oil and gas, perform no work on state land, have no contractual relationship with the State, and *receive no payment from the State*." *Id.* (emphasis added).

126. *See supra* note 65 and accompanying text.

127. 437 U.S. at 528-29. *See also* Toomer, 334 U.S. at 402; Salla, 48 N.Y.2d at 524, 399 N.E.2d at 914, 423 N.Y.S.2d at 882.

128. Recent Cases, *supra* note 67, at 360. *Toomer* expressed a similar view that the *McCready* doctrine, or the special property right of a state in its resources, is a fiction stating that a state has power to preserve and regulate the exploitation of its resources. But this must be done within the Constitutional command, not to discriminate without reason against citizens of another state. 334 U.S. at 402.

McCready and *Corfield* can no longer be viewed as valid on a basis other than an ownership theory. Both cases tried to limit employment in extracting and planting shellfish for their citizens. When viewed in this light, there is no justification to limit employment to state citizens. Courts are unlikely to consider employment as the common property of a state and therefore a *McCready* exception to barriers to nonresident employment is inappropriate. *Alaska Hire*, *supra* note 67, at 1076-78. But see Ebbeson v. Board of Public Educ., 156 A.286 (1931) where the *McCready* doctrine was used to uphold an employment preference statute in public works and allow the state to prefer its own citizens in receiving benefits from its common property to its common owners.

129. *See supra* note 65.

portance, in determining the validity of a statute.[130]

Another potential exception to the restrictions of the privileges and immunities clause, the market participant doctrine,[131] was superficially rejected by the court in the *MCCE* decision. Arguably, the market participant doctrine can be applied to *MCCE* because of the "mutually reinforcing relationship between the Privileges and Immunities Clause of [Article] IV . . . and the Commerce Clause."[132] The doctrine would allow Massachusetts to favor its residents when the state spent its own money in the construction of public works. This favoritism could take the form of qualifying the terms of any contract into which the state entered. Those terms may well be that an employer, constructing public works funded by state money, would have to hire unemployed residents before nonresidents to complete the project.[133] This condition goes only to the first level of contract between the state and the contractor, and therefore, would still be a valid proprietary interest of the state.[134]

The statute would still be required to meet the substantial reason test but the market participant doctrine would weigh in the overall balancing of interests like any other factor under consideration.[135] A state may not, however, have a requirement that *all* busi-

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130. *See supra* note 127 and accompanying text.

131. *See supra* notes 99-105 and accompanying text.

132. 437 U.S. at 531. Although the Court has considered the two clauses as complementary, there is no case that explicitly allows the market participant doctrine to be applied in privileges and immunities clause decisions. Rather, the Court has implicitly stated the proposition. *See* Doe v. Bolton, 410 U.S. 179 (1973); Toomer v. Witsell, 334 U.S. 385 (1948); Heim v. McCall, 239 U.S. 175 (1915); Crane v. New York, 239 U.S. 195 (1915); Geer v. Connecticut, 161 U.S. 519 (1896); McCready v. Virginia, 94 U.S. 391 (1876).

133. This condition, that the contractor would have residents of Massachusetts completing the construction project whether they were his own employees or a subcontractor's, prevents the contractor from circumventing the condition by having subcontractors do the work with nonresidents. The court distinguished the defendants' argument on this point but failed to see that this condition, like other valid market participant cases, only applied to the initial contract. 1981 Mass. Adv. Sh. at 2051, 425 N.E.2d at 353.

134. *See supra* notes 99-105 and accompanying text.

In *Salla*, the dissenting opinion thought this issue was determinative. The privileges and immunities clause, like the commerce clause, does not restrict a state in its proprietary actions or its spending power. The New York statute was directed only at jobs created by New York's exercise of its spending power. 48 N.Y.2d at 526-27, 399 N.E.2d at 916, 423 N.Y.S.2d at 884-85.

135. The dissent in *Salla* stated that this argument was enough to sway the balance in favor of finding the statute valid under a privileges and immunities analysis when the statute was directed only at jobs that the state had created by exercising its spending power. 48 N.Y.2d at 526-27, 399 N.E.2d at 915-16, 423 N.Y.S.2d at 884-85.

This view was also mentioned in *Doe*. If the state regulation had been concerned

nesses in the state give hiring preferences to residents because this would be an unreasonable regulation under *Hicklin*.[136] The Supreme Court stated in *Hicklin* that Alaska had little or no proprietary interest in the activities swept within the broad reach of the statute.[137] Massachusetts, however, did not attempt to regulate all businesses, as in *Hicklin*, because the statute only applied to those businesses that were constructing public works. The *MCCE* court did not consider the market participant doctrine in this light and neglected to appreciate this valid distinction. Instead, the court inappropriately relied upon *Hicklin* and rejected the defendants argument.[138]

Even if the market participant doctrine had been considered by the court, however, the outcome of the *MCCE* decision would not have been different. While the doctrine is a factor to be considered, it does not provide a valid justification for the absolute preference of employed residents over unemployed nonresidents. The market participant doctrine remains as an important factor to be considered in the delicate balancing process of the privileges and immunities clause analysis. It is imperative that courts consider every factor so that this analysis will not be short-circuited.

A proper privileges and immunities clause analysis of the *MCCE* case would examine the statutory language and the facts presented to determine if nonresidents were the *peculiar source* of the unemployment that the statute sought to alleviate. The decision would have also balanced Massachusetts' proprietary interest, to build and finance public works projects, against the right of nonresidents to be free from discrimination based solely on residency. This process would ensure that a substantial reason existed for the discrimination practiced upon the nonresidents.

The Massachusetts statute does not meet the substantial reason test because it established a preference for all residents, whether em-

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with the spending of state monies, the state could prefer its own residents. Doe v. Bolton, 410 U.S. 179 (1973). *See also* Knox, *supra* note 17, at 21. Following this view, it seems clear that Massachusetts could have limited its public works contracts to residents.

136. 437 U.S. at 531.

137. *Id.* at 529. Alaska sold and leased land to *private* individuals and then required those individuals to hire only residents. This is a pure regulation and not a proprietary interest. *See* Knox, *supra* note 17, at 19 n.115, 23. *But see* Wells & Hellerstein, *supra* note 100, at 1115, 1129 (a desire to provide employment for its own residents is politically motivated and not a proprietary interest); Knox, *supra* note 17, at 24 (allowing states to avoid privileges and immunities clause restrictions by merely asserting their regulations are proprietary interests).

138. *See supra* note 105 and accompanying text.

ployed or unemployed. The statute was not aimed at the *peculiar source of the evil*, because employed residents do not contribute to unemployment. Even considering the factor of Massachusetts' proprietary interests in the land it owns and the funds it spends does not sufficiently mask the discrimination or avoid the conclusion that the policy behind the statute is geographic exclusion.

V. CONCLUSION

The Massachusetts employment preference statute on public works construction cannot withstand the scrutiny of the Privileges and Immunities Clause of the United States Constitution because it was not directed at the *peculiar source of the evil* that the statute sought to remedy. The *MCCE* decision minimized any detrimental consequences to the construction industry by allowing contractors to operate in a conventional manner by keeping an intact skilled work force without reference to residency. The net result will be lower costs in the construction of public works projects due to decreased operating costs, increased work force efficiency and more competitive bids.[139] Although the decision is correct in the final analysis, it is lacking an in-depth analysis of the issues. Litigation has been increasing in the past decade under the privileges and immunities clause and it would have been beneficial had the court provided more guidelines to help clear the confusion that has traditionally surrounded the clause.

The substantial reason test requires the court to examine the statute to determine if it is properly aimed at the source of the problem it seeks to remedy. It also requires that there be a substantial relationship between the valid state goal and the discrimination practiced. Applying the first part of the substantial reason analysis as the court did, one concludes, the statute is not aimed at the *peculiar source of the evil*. The statute established a preference for all residents whether employed or unemployed and is therefore not closely tailored. For this reason, the statute cannot be upheld under the privileges and immunities clause.

The court did not stop at this point in the decision but went on to examine some other potential justifications of the statute. This portion of the decision, however, did not consider the important doctrines that other courts have considered to justify state discrimina-

139. *See* Brief for Plaintiffs-Appellants at 6, *supra* note 1; Salla v. County of Monroe, 48 N.Y.2d at 524, 399 N.E.2d at 914, 423 N.Y.S.2d at 883.

tion against nonresidents: namely, the market participant and the *McCready* doctrines.

If the court had examined these judicially created exceptions, as it should have in a proper substantial reason test, it might have found that the Massachusetts statute was distinguishable from *Hicklin*. The statute covered only a limited area of employment in the construction of public works and set the conditions that a private party would have to meet in order to do business with the state. Because this is a condition that extends only to the first level of contract, it is a valid proprietary action of the state.

State ownership of the property and the funds to finance the construction of public works is a crucial factor, as is the valid state proprietary function of favoring the residents of the state in expenditure of those funds. These factors, combined with the more narrow extent that this statute discriminated against nonresidents compared with *Hicklin*, shows that enough distinctions between *MCCE* and *Hicklin* existed for the court to provide a more detailed analysis of the privileges and immunities clause restriction.

A proper privileges and immunities analysis would have considered the valid distinctions between *MCCE* and *Hicklin*. The court would have weighed the market participant and *McCready* doctrines as well as considered the language of the statute to determine whether the statute unreasonably discriminated against nonresidents. This omission by the court seriously affects the force and usefulness of its decision.

If the statute had been drawn to prefer only unemployed residents rather than all residents, the critical flaw of the statute, the court intimated that it would have affirmed the law. In this situation, the exceptions to privileges and immunities clause scrutiny would then shift the balance to weigh in favor of the state. Thus, Massachusetts may validly prefer its unemployed residents, when it decides to spend state money on the construction of public works, and provide benefits to those people who have contributed to the state funds.

John Lauring